STATE OF MICHIGAN

COURT OF APPEALS

LINDA GOLDMAN,

Plaintiff-Appellant,

v

MARTIN R. GOLDMAN, ARTHUR A. WEISS, and JAFFE, RAITT, HEUER & WEISS, P.C.,

Defendants,

and

SHELDON A. GOLDMAN, CROWN ASSOCIATES OF MICHIGAN, INC., GOLDMAN INSURANCE AGENCY, INC., LUBIN SCHWARTZ & GOLDMAN INSURANCE, NEAL F. ZALENKO, and ZALENKO & ASSOCIATES, P.C.,

Defendants-Appellees.

UNPUBLISHED
July 17, 2008

No. 274060
Oakland Circuit Court
LC No. 2006-072501-CK

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's orders granting summary disposition for defendants Sheldon A. Goldman, Crown Associates of Michigan, Inc., Goldman Insurance Agency, Inc., and Lubin Schwartz & Goldman Insurance (collectively referred to as the "insurance defendants"), and Neal F. Zalenko and Zalenko & Associates, P.C (collectively referred to as the "Zalenko defendants"), pursuant to MCR 2.116(C)(8).[1] Plaintiff also challenges the trial court's orders denying her motion to file an amended complaint and denying her motion for reconsideration. We affirm in part, reverse in part, and remand for further proceedings.

[1] The remaining defendants were dismissed from this appeal by stipulation.

I

Defendant Martin Goldman ("Martin") is plaintiff's ex-husband. This action arises from plaintiff and Martin's formation of two limited liability corporations, Goldman Family Enterprises, L.L.C., and 201 Lakewood, L.L.C. ("Lakewood LLC"), after their divorce. Plaintiff alleges that Martin, the insurance defendants, and the Zalenko defendants colluded to create and use these companies to deprive her of assets she received in her divorce settlement with Martin.

Plaintiff alleges that Goldman Family Enterprises was formed pursuant to a plan to transfer ownership of her Sun Life insurance policy to the corporation in exchange for a cash payment. She contends that defendants forged a transfer of ownership form that transferred ownership of the policy to Martin, rather than Goldman Family Enterprises, without compensating her for the transfer.

Following their divorce, Martin made cash payments of more than $3 million to plaintiff, which plaintiff maintains were gifts, not a loan. When the parties formed Lakewood LLC, Martin's capital contribution was identified as a $3 million receivable that represented plaintiff's obligations to repay the cash payments to him. Plaintiff contributed her ownership interest in a condominium in Aspen, Colorado. The Lakewood LLC operating agreement provided that if and when the condominium was sold, plaintiff's debt would be repaid as a priority distribution from the proceeds.

Plaintiff's allegations regarding Lakewood LLC changed over the course of the litigation. Initially, she alleged that she signed the operating agreement in 2001, without reading the documents, because she trusted that her personal accountant, Zalenko, and her attorney, defendant Arthur Weiss, were safeguarding her interests. In her first amended complaint, she alleged that she did not realize that the operating agreement recast Martin's monetary gifts as loans that would be repaid from the condominium proceeds. Subsequently, plaintiff alleged that she did not receive a copy of the operating agreement until 2003, and that the documents she received were not the documents she signed in 2001. Plaintiff alleged that defendants attached the original signature page to a modified agreement. She maintains that the original documents contained terms that would have enabled her to prevent Martin from receiving a priority distribution from the condominium sale.

After the condominium was sold, the proceeds were placed in escrow. Martin filed an action against Lakewood LLC to compel payment. Plaintiff thereafter brought this action against defendants, asserting claims for fraud, conversion, conspiracy, and violation of the federal Racketeer Influenced Corrupt Organization (RICO) statute, 18 USC 1962.

Defendants filed a series of summary disposition motions, only two of which are at issue in this appeal. As relevant to this appeal, the trial court granted the insurance defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) with respect to the conversion and RICO claims, but denied their motion with respect to the fraud and conspiracy claims. The court also granted the Zalenko defendants' motion for summary disposition with respect to plaintiff's RICO claim pursuant to MCR 2.116(C)(8).

While various other summary disposition motions were pending, plaintiff filed a motion for leave to file a second amended complaint. The trial court denied the motion. Plaintiff then

filed a motion for reconsideration in which she submitted a "proposed revised second amended complaint," which the trial court also denied.

II

Plaintiff first argues that the trial court erred in dismissing her conversion claim against the insurance defendants, and her RICO claim against both the insurance defendants and the Zalenko defendants, pursuant to MCR 2.116(C)(8).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* The motion may be granted only if the claim alleged is "so clearly unenforceable as a matter of law that no factual development could justify recovery." *Id.*

Plaintiff argues that her complaint sufficiently stated a claim for both statutory and common-law conversion against the insurance defendants. Because plaintiff's claim arose in 2003, when Martin assumed ownership of the life insurance policy, any statutory claim is governed by the version of MCL 600.2919a in effect before the statute was amended by 2005 PA 44. Former MCL 600.2919a provided, in pertinent part:

> A person damaged as a result of another person's *buying, receiving, or aiding* in the concealment of any *stolen, embezzled, or converted property* when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise. [Emphasis added.]

In *Marshall Lasser, PC v George*, 252 Mich App 104, 112; 651 NW2d 158 (2002), this Court explained that this version of MCL 600.2919a did not provide a cause of action against persons who stole, embezzled, or converted the property in question, but rather provided relief only against persons who received converted property. The Court explained:

> The actions proscribed—buying, receiving, or aiding in the concealment—all occur after the property has been stolen, embezzled, or converted by the principal. In other words, the statute is not designed to provide a remedy against the individual who has actually stolen, embezzled, or converted the property. Indeed, the statute carefully compartmentalizes the actions of those assisting and the actions of the principal. [*Id.*]

Plaintiff's complaint alleged that the insurance defendants "stole, embezzled or converted the property of Plaintiff Linda Goldman by wrongly transferring her ownership interest in the $4 million Sun Life insurance policy." Because plaintiff's complaint alleges that the insurance defendants participated in the conversion of her property, it alleges conduct that falls outside the

scope of former MCL 600.2919a. Therefore, the complaint failed to state a claim for statutory conversion.

We agree with plaintiff, however, that her complaint sufficiently stated a claim for common-law conversion. The common-law tort of conversion is defined as "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). "The gist of conversion is the interference with control of the property." *Sarver v Detroit Edison Co*, 225 Mich App 580, 585; 571 NW2d 759 (1997), quoting Prosser & Keeton, Torts (5th ed), § 15, p 102. Plaintiff's first amended complaint alleged as follows:

> 61. [Insurance defendants] stole, embezzled, or converted the property of Plaintiff Linda Goldman by wrongly transferring her ownership interest in the $4 million Sun Life insurance policy.
>
> 62. Defendant Martin Goldman knowingly received the stolen, embezzled, or converted property of Plaintiff Linda Goldman by accepting the transfer of Plaintiff's ownership interest in the $4 million Sun Life insurance policy to himself and then terminating and cashing in the policy and retaining the cash value of the policy.
>
> 63. Plaintiff has been damaged by Defendant Martin Goldman's receipt of her ownership interest in the $4 million Sun Life insurance policy.
>
> 64. Pursuant to MCL 600.2919a Plaintiff is entitled to 3 times the amount of damages she sustained, plus costs and reasonable attorney fees.
>
> WHEREFORE, Plaintiff requests that this court:
>
> (a) Enter judgment in her favor and against [Martin and insurance defendants] in an amount which will adequately compensate Plaintiff for her losses and damages, as described above, trebled as provided by statute, together with interest, costs and reasonable actual attorneys' fees;
>
> (b) Grant such additional relief as may be just, equitable and in accordance with law.

Plaintiff also alleged that defendants altered the transfer of ownership form without her consent in order to designate Martin as the transferee.

These allegations, accepted as true and construed in a light most favorable to plaintiff, are sufficient to state a claim for common-law conversion. Plaintiff's allegations that the insurance defendants converted the Sun Life policy by wrongfully transferring it to Martin sufficiently allege a "distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Head, supra* at 111. Although plaintiff's claim for statutory treble damages under MCL 600.2919a was properly dismissed, her complaint

sufficiently stated a claim for common-law conversion to withstand summary disposition under MCR 2.116(C)(8).

The insurance defendants argue that even if plaintiff's complaint sufficiently states a claim for common-law conversion, dismissal was proper because plaintiff is unable to factually support her claim. Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In this case, however, the insurance defendants only moved for summary disposition under MCR 2.116(C)(8). Therefore, a reviewing court's review is limited to the well-pleaded allegations in plaintiff's complaint. *Maiden*, *supra* at 119-120. Because the insurance defendants did not move for summary disposition under MCR 2.116(C)(10), specifically identifying the issues for which it believed there was no genuine issue of material fact, plaintiff did not have the opportunity to respond to such a motion and she was not obligated to set forth specific facts showing a genuine issue for trial. MCR 2.116(G)(4). Therefore, affirmance on this basis is inappropriate.

Accordingly, we affirm the trial court's dismissal of plaintiff's claim for statutory conversion agains the insurance defendants pursuant to MCR 2.116(C)(8), but reverse the trial court's dismissal of plaintiff's claim for common-law conversion and remand for further proceedings. On remand, the insurance defendants are not precluded from filing an appropriate motion for summary disposition of the common-law conversion claim pursuant to MCR 2.116(C)(10).

III

Next, plaintiff challenges the dismissal of her RICO claim against both the insurance defendants and the Zalenko defendants.

Plaintiff's first amended complaint contained the following allegations in support of her RICO claim:

> 68. Defendants conceived of and created an enterprise for the purpose and with the intent to recover from Plaintiff property awarded to her in the parties' divorce, and to avoid Defendant's gift tax liability created by gifts to Plaintiff after the divorce was final.
>
> 69. As part of their scheme and enterprise, Defendants organized and created Goldman Family Enterprises, LLC, for the purpose of deceiving Plaintiff regarding their intentions.
>
> 70. As part of their scheme and enterprise, Defendants organized and created 201 Lakewood, LLC, for the purpose of deceiving Plaintiff regarding their intentions and to attempt to obtain Plaintiff's property by trick and artifice.
>
> 71. Defendants employed the United States mail as part of their scheme to defraud. The documents relating to the organization and funding of the two LLC's were delivered to Plaintiff and to the State of Michigan through the United

States mail. Communications regarding the two LLCs were made through the United States mail.

72. Defendants employed telephone communications as part of their scheme to defraud. Defendants made reference to the two LLCs and to their fraudulent scheme and enterprise on the telephone. Defendants communicated to Plaintiff concerning the two LLCs on the telephone.

73. Defendants transferred funds through accounts in financial institutions engaged in interstate commerce as part of their scheme to defraud. Defendants deposited or caused to be deposited in financial institutions the proceeds of the sale of the Colorado condominium, and the cash surrender value of the Sun Life policy.

74. The acts and conduct described above were part of an illegal conspiracy to engage in a pattern of racketeering activity, in violation of 18 USC 1962(c).

Offenses arising under RICO are set forth in 18 USC 1962, which provides, in pertinent part:

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Accordingly, to establish a RICO claim, plaintiff must show that defendants engaged in a pattern of racketeering activity, and that this pattern related to the acquisition, operation, or control of an enterprise involved in interstate commerce.

The RICO statute defines "pattern of racketeering activity" as the commission of two predicate acts within ten years of each other. 18 USC 1961(5); *American Eagle Credit Corp v Gaskins*, 920 F2d 352, 354 (CA 6, 1990). In *HJ, Inc v Northwestern Bell Tel*, 492 US 229, 238; 109 S Ct 2893; 106 L Ed 2d 195 (1989), the United States Supreme Court expanded upon the pattern element by requiring that the plaintiff show at least two predicate acts of racketeering that are related and amount to or pose a threat of continued criminal activity.

We first examine whether plaintiff's complaint sufficiently alleges that defendants engaged in racketeering activity. The complaint generally alleges that defendants "employed"

telephone communications and the United States mail "as part of their scheme to defraud." Plaintiff also alleges that defendants "transferred funds through accounts in financial institutions engaged in interstate commerce as part of their scheme to defraud." The term "racketeering activity" includes, among other things, any act indictable under the federal mail fraud statute, 18 USC 1341, or the wire fraud statute, 18 USC 1343. 18 USC 1961(1). Financial institution fraud, 18 USC 1344, also is listed as a predicate offense. 18 USC 1961(1).

Plaintiff's general allegations that defendants used telecommunications and the United States mail as part of their alleged fraudulent scheme are insufficient to assert a claim under RICO. A plaintiff asserting mail fraud or wire fraud as the predicate indictable offenses in a RICO claim "must show that each element of mail fraud or wire fraud has been committed by the defendants." *Central Distributors of Beer, Inc v Conn*, 5 F3d 181, 184 (CA 6, 1993). To establish a claim for mail fraud, the plaintiff must "show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." *Id.*; *Schreiber Distributing Co v Serv-Well Furniture Co*, 806 F2d 1393, 1399-1400 (CA 9, 1986). "Similarly, a wire fraud violations [sic] consists of (1) the formation of a scheme or artifice to defraud (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." *Central Distributors of Beer*, *supra* at 184, quoting *Schreiber*, *supra* at 1400. Furthermore, the defendants "must make a false statement or omission of fact *to the plaintiff*." *Central Distributors of Beer, supra* at 184 (emphasis in original).

In this case, plaintiff merely alleges that defendants used mail and wire communications as "part of" their fraudulent scheme. Plaintiff does not allege that defendants used these communications to make any misrepresentations to her with a specific intent to deceive or defraud. Plaintiff's complaint does not sufficiently allege the predicate offenses of mail fraud and wire fraud.

Plaintiff's complaint also lacks sufficient allegations of financial institution fraud. A valid claim of financial institution fraud must establish that the acts alleged exposed the custodial bank to the risk of civil liability. *Crowe v Henry*, 115 F3d 294, 299 (CA 5, 1997). No such allegations were made here.

Furthermore, plaintiff failed to plead that defendants engaged in a pattern of racketeering conduct. The term "pattern" requires "the showing of a relationship between the predicates and of the threat of continuing activity. It is this factor of *continuity plus relationship* which combines to produce a pattern." *HJ, Inc*, *supra* at 239 (internal citations omitted, emphasis in original). "Continuity and relationship constitute two analytically distinct prongs of the pattern requirement." *Moon v Harrison Piping Supply*, 465 F3d 719, 724 (CA 6, 2006), quoting *Vild v Visconsi*, 956 F2d 560, 566 (CA 6, 1992).

Plaintiff alleges, generally, that defendants used mail and telephone communications, but does not specify when or how often, or the content of any communications. The alleged acts of mail fraud relate to two distinct schemes, one involving the formation of Goldman Family Enterprises for the purpose of converting plaintiff's life insurance policy, and the other the formation of Lakewood LLC for the purpose of unlawfully acquiring plaintiff's interest in the marital home and the Aspen condominium.

The facts alleged here are comparable to those in *Al-Abood v El-Shamari*, 217 F3d 225 (CA 4, 2000). In that case, the court acknowledged that a RICO violation could arise from two or more acts of mail or wire fraud, but expressed caution "about basing a RICO claim on predicate acts of mail and wire fraud because it will be the unusual fraud that does not enlist the mails and wires in its service at least twice." *Id.* at 238 (citation and internal quotations omitted). The court explained:

> This caution is designed to preserve a distinction between ordinary or garden-variety fraud claims better prosecuted under state law and cases involving a more serious scope of activity . . . . We have reserved RICO liability for ongoing unlawful activities whose scope and persistence pose a special threat to social well-being. [*Id.* (citations and internal quotations omitted).]

Although the court noted that "[t]here is no per se rule against a RICO claim involving only one victim," it concluded that "the narrow focus of the scheme here—essentially a dispute between formerly close family friends—combined with the commonplace predicate acts persuades us that the facts here do not satisfy the pattern requirement." *Id.* The court also concluded that the case was "not sufficiently outside the heartland of fraud cases to warrant RICO treatment," because "[t]he main predicate acts here were mail and wire fraud, and although they were related and involved three discrete schemes spanning several years, there was only one victim of the fraud." *Id.* See also *North Bridge Assoc, Inc v Boldt*, 274 F3d 38, 43 (CA 1, 2001) (holding that two letters within a four-month period did not establish a closed period of continuous criminal activity).

Plaintiff relies on *Gen Motors Corp v Ignacio Lopez de Arriortua*, 948 F Supp 670, 678 (ED Mich, 1996), to support her argument that a RICO claim can be based on a pattern of conduct against one person. However, the RICO claim in *Gen Motors* was based on a clear pattern of conduct over 16 months that included multiple schemes and predicate acts, including plans to steal boxes of trade secrets, transport stolen documents overseas, and destroy evidence. *Id.* In contrast, plaintiff here makes only general allegations that defendants used wire and mail communications in connection with two distinct fraudulent schemes (only one of which involved the Zalenko defendants). We therefore conclude that the trial court properly dismissed plaintiff's RICO claim pursuant to MCR 2.116(C)(8).

IV

Plaintiff next argues that the trial court erred in denying her motion to file a second amended complaint. We review the trial court's decision for an abuse of discretion. *Tierney v Univ of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006); *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). If the trial court selects a principled outcome, there is no abuse of discretion, and the reviewing court must defer to the trial court's ruling. *Id.*

Amendment is generally a matter of right rather than grace, and a trial court should freely grant leave to amend if justice so requires. MCR 2.118(A)(2); *Tierney, supra* at 687. "'Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or

dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile.'" *Id.* at 687-688, quoting *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996).

Here, the trial court denied plaintiff's motion to amend because she failed to file a brief in support of her motion and because defendants would be prejudiced by the delay. MCR 2.119(A)(2) provides that "[a] motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based." Plaintiff moved to amend her complaint in order to correct defects that previously resulted in the trial court granting summary disposition for defendants. The question whether the amended pleading stated a valid legal claim presented a question of law; therefore, plaintiff was required to file a brief in support of her motion. Furthermore, we have reviewed the second amended complaint and agree that it neither corrects the deficiencies in the first amended complaint, nor materially alters the substance of plaintiff's claims. For these reasons, the trial court did not abuse its discretion in denying the motion to amend.

V

Plaintiff also argues that the trial court erred in denying her motion for reconsideration of her motion to file a second amended complaint. This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

MCR 2.119(F), which governs motions for reconsideration, provides:

> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the trial court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Plaintiff argues that she and the trial court were misled by the erroneous belief that the "fake" operating agreement for Lakewood LLC was the original document, and that her discovery of the "original" operating agreement warrants reconsideration. However, the subsequent discovery of that document could not have established a palpable error relating to the decision for which reconsideration was sought, namely, the trial court's denial of plaintiff's earlier motion to amend her complaint. While plaintiff's discovery of the document may have constituted a ground for filing a new motion to file an amended complaint, it could not logically support a motion for reconsideration of a decision that was made before the document was discovered. Thus, the trial court did not err in denying plaintiff's motion for reconsideration.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio